Supreme Court, U.S.
FILED
AUG 10 1998
OFFICE OF THE CLERK

No. 98-112

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DAWN DEE BRYANT, ET AL.,

Petitioners,

v.

GENERAL DYNAMICS CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

WILLIAM J. KILBERG
(Counsel of Record)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 467-0539

KARL G. NELSON
GIBSON, DUNN & CRUTCHER LLP
1717 Main Street, Suite 5400
Dallas, Texas 75201-7390
Telephone: (214) 698-3100
Facsimile: (214) 698-3400

Attorneys for Respondent
GENERAL DYNAMICS CORPORATION

QUESTIONS PRESENTED

1. Whether the District Court acted within the scope of its broad discretion when it denied Petitioners' request to delay ruling on summary judgment to allow additional time for discovery.

2. Whether the Court of Appeals correctly held, based on the record before it, that the Government's abrupt decision to cancell the Navy's A-12 program leading to the layoffs at issue in this case was not "reasonably foreseeable" within the meaning of the Worker Adjustment and Retraining Notification Act.

RULE 29.6 STATEMENT OF AFFILIATED CORPORATIONS

Respondent **General Dynamics Corporation** has neither a parent company nor any nonwholly owned subsidiary requiring identification pursuant to Rule 29.6 of the Rules of the Supreme Court.

TABLE OF CONTENTS

	PAGE(S)
QUESTIONS PRESENTED	i
STATEMENT OF AFFILIATED CORPORATIONS	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
I. Petitioners' Failure to Seek Discovery Does Not Raise Constitutional or Other Issues Warranting This Court's Review	3
II. There is No Conflict Among the Circuits or Other Authorities Warranting This Court's Review	5
III. This Case Raises No Issue of Broad Application Warranting this Court's Review	9
CONCLUSION	9

TABLE OF AUTHORITIES

	PAGE(S)
CASES	
Brady v. Southern Ry. Co., 320 U.S. 476 (1943)	7
Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994)	7
General Talking Pictures Corp. v. Western Elec. Co., 304 U.S. 175 (1938)	8
International Ass'n of Machinists v. General Dynamics Corp., 821 F. Supp. 1306 (E.D. Mo. 1993)	2, 6
International Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257 (5th Cir. 1991), *cert. denied*, 502 U.S. 1059 (1992)	4
Jurcev v. Central Community Hospital, 7 F.3d 618 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1830 (1994)	8
Local Union 7107 v. Clinchfield Coal Co., 124 F.3d 639 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1189 (1998)	8
Loehrer v. McDonnell Douglas Corp., 98 F.3d 1056 (8th Cir. 1996)	2, 5, 6, 8
Loehrer v. McDonnell Douglas Corp., No. 4-91 CV 01747, slip op. (E.D. Mo. Oct. 14, 1995), *aff'd*, 98 F.3d 1056 (8th Cir. 1996)	6
McDonnell Douglas Corp. v. United States, 35 Fed. Cl. 358 (1996)	2, 6
Stack v. Boyle, 342 U.S. 1 (1951)	3
STATUTES AND REGULATIONS	
Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C. §§ 2101-2109	1
29 U.S.C. § 2102(b)(1)	5
29 U.S.C. § 2102(b)(2)(A)	1
20 C.F.R. § 639.7(b)	5
20 C.F.R. § 639.7(d)(2)	5
20 C.F.R. § 639.9(b)(1)-(2)	7
20 C.F.R. § 639.10(b)	5

STATEMENT OF THE CASE

While the Worker Adjustment and Retraining Notification Act of 1988 ("WARN"), 29 U.S.C. §§ ~~2101-2109,~~ generally requires 60-days' notice to employees before a covered mass layoff, the statute provides an exception in the event of "business circumstances that were not reasonably foreseeable as of the time that notice would have been required." 29 U.S.C. § 2102(b)(2)(A). Here, General Dynamics did not know, and could not have known, with any precision in November of 1990 whether the Government would cancel the Navy's A-12 program, much less that it would do so in January of 1991. *See* Petitioners' Appendix ("Pet. App.") at A29 ("no rational jury could have concluded that contract cancellation was a foreseeable probability until the last minute"). Rather, as the courts below correctly observed, all that existed 60 days in advance of the abrupt cancellation of the A-12 program was the possibility—inherent in every such contract—that the Government might cancel the program at some future date for any number of reasons. Pet. App. at A27 ("cancellation is a possibility every time there is a cost overrun, . . . and experience teaches us that there are invariably overruns, which most often do not lead to contract cancellation"). WARN cannot require an employer to notify its employees of every mass layoff threat, no matter how remote. Pet. App. at A27 (characterizing such a standard as "impracticable"). Accordingly, the Court of Appeals interpreted the term "reasonably foreseeable" to include only those business circumstances that were likely—or "probable"—at the time notice would have otherwise been required. Since there was no evidence that the A-12's cancellation was even arguably "probable" prior to General Dynamics' issuance of WARN notices in

mid-December 1990, the unanimous Court of Appeals affirmed the District Court's dismissal of Petitioners' claim.[1]

Dissatisfied with the result reached before the District Court and affirmed by the Court of Appeals, Petitioners would have this Court revisit their claims in the context of certiorari. In an effort to justify this review, they phrase their request in terms of "Constitutional rights" and "circuit splits." But while Petitioners parrot various grounds for granting certiorari, they fail to explain why the decisions below even arguably merit this Court's review. The violation of Constitutional rights Petitioners allege is nothing more than an exercise of sound discretion by the District Court, which the Court of Appeals left undisturbed. Petitioners can hardly turn their own failure to take discovery in a timely manner into a Constitutional issue worthy of this Court's attention. Similarly, the conflict Petitioners allege to exist between the Court of Appeals' application of WARN and decisions from other courts is illusory. Indeed, one of the cases Petitioners rely on to demonstrate the alleged conflict among the circuits actually reaches the same result on claims arising from the same facts as here. *Loehrer*, 98 F.3d at 1062 ("we think that the Government's cancellation of the A-12 contract was not reasonably foreseeable . . . prior to January 7, 1991"). Thus, Petitioners seek this Court's review without any basis.

REASONS FOR DENYING THE WRIT

The Petition raises no issue appropriate for this Court's review. Petitioners suggest that the District Court's refusal to stay General Dynamics' summary judgment motion violated

---

[1] Thorough statements of the facts and procedural history of this case are set forth in the decisions of the courts below. Pet. App. A2-A3, A5-A9, A19-A23, A27-A29. Additional detailed descriptions of the A-12 program's history and the events leading to its cancellation are reported at *Loehrer v. McDonnell Douglas Corp.*, 98 F.3d 1056, 1057-60 (8th Cir. 1996); *McDonnell Douglas Corp. v. United States*, 35 Fed. Cl. 358, 361-68 (1996); and *International Ass'n of Machinists v. General Dynamics Corp.*, 821 F. Supp. 1306, 1307-11 (E.D. Mo. 1993).

their Constitutional rights and this Court's summary judgment standards. Yet this suggestion does not explain Petitioners' failure to pursue discovery prior to the District Court's ruling or excuse their inability to demonstrate how any such discovery might have changed the outcome of their case. Accordingly, Petitioners' argument amounts to nothing more than an attempt to involve this Court in evidentiary and scheduling matters resolved in the sound discretion of the District Court and left undisturbed by the Court of Appeals. Similarly, Petitioners suggest that the unanimous decision of the Court of Appeals conflicts with WARN and the decisions of other circuits applying the statute's "business circumstances" exception. Yet Petitioners have not identified any conflict warranting this Court's review. Indeed, one of the decisions with which Petitioners suggest the Court of Appeals is in conflict reached the same result as the courts below on virtually identical facts. Accordingly, Petitioners have offered no grounds on which the writ they seek would be appropriate.

I. Petitioners' Failure to Seek Discovery Does Not Raise Constitutional or Other Issues Warranting This Court's Review.

Petitioners suggest that, by refusing to postpone consideration of General Dynamics' motion for summary judgment, the District Court violated Petitioners' Constitutional rights and this Court's summary judgment standards. Petitioners' Brief ("Brief") at 14-19. Despite these characterizations, the heart of Petitioners' argument is the assertion that they were allowed an inadequate opportunity to conduct discovery. Except in the most extreme cases, however, dissatisfaction with a lower court's exercise of discretion on scheduling and discovery matters does not justify review by writ of certiorari. *See, e.g., Stack v. Boyle,* 342 U.S. 1, 13 (1951) ("this Court will not exercise its certiorari power in individual cases except where they are typical of a problem so important and general as to deserve the attention of the supervisory power") (Jackson, J., concurring).

Even if review by this Court were warranted, moreover, Petitioners could not overcome their own failure to seek the discovery they claim they were denied. In particular, a claim of inadequate opportunity for discovery overlooks the fact that, excluding the class certification process and time spent on appeal, Petitioners had a cumulative period of nearly six months in which to conduct discovery on their claims, yet they propounded no discovery request of any kind on General Dynamics during this time. Thus, as the District Court observed: "there is no merit to [Petitioners'] argument that they should be entitled to conduct discovery through the date set by the court's scheduling order for discovery cutoff before being required to respond to a motion for summary judgment." Pet. App. at A15 n.6.

Similarly, in leaving undisturbed the District Court's exercise of discretion in this regard, the Court of Appeals correctly noted: "[Petitioners] have not demonstrated to this Court that further discovery would lead to any evidence, which might raise the A-12 contract cancellation from a possibility to a probability any sooner than December 14, 1990." Pet. App. at A30. Thus, the Court of Appeals followed well-established precedent holding that Petitioners were obligated to show not only diligence in pursuing the discovery in question, but also specifically how the requested discovery would defeat summary judgment. *See, e.g., International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1267 (5th Cir. 1991), *cert. denied*, 502 U.S. 1059 (1992). In their Petition, as below, Petitioners fail to describe with any precision what evidence they expected to find in the neglected discovery that was different from that presented and ultimately rejected in each of the A-12-related cases that preceded this one. Pet. App. at A16 ("[Petitioners] do not specify, however, the facts they expect to prove by such depositions . . . [n]or do they explain what they hope to glean from the voluminous documents produced in prior litigation of WARN claims"). Accordingly, Petitioners have identified no basis on which this Court should review the sound discretion exercised by the District Court and left undisturbed by the unanimous panel of the Court of Appeals.

II. There is No Conflict Among the Circuits or Other Authorities Warranting This Court's Review.

Petitioners suggest that the Court of Appeals' application of WARN's "business circumstances" exception conflicts with the statute, its regulations, and the decisions of other courts. Brief at 19-27. Petitioners fail, however, to demonstrate the existence of any such conflict. Indeed, Petitioners point to the Eighth Circuit's decision in *Loehrer v. McDonnell Douglas Corp.*, 98 F.3d 1056 (8th Cir. 1996), as evidence of a purported circuit split. Yet in *Loehrer*, the Eighth Circuit reached precisely the same conclusion—on virtually identical facts involving General Dynamics' partner on the A-12 program—as did the Court of Appeals in the instant case. Thus, Petitioners cannot demonstrate that the conflict they perceive, even if it existed, would make a difference in this case.

In enacting WARN, Congress struck a balance between too little notice of mass layoffs (with employees needlessly deprived of an opportunity to prepare) and too much notice (with employees unnecessarily alarmed and the credibility of subsequent notices reduced). Accordingly, WARN requires notice of real and proximate layoffs, but does not sanction generalized or "rolling" notices that fail to provide concrete details about actual events. 20 C.F.R. §§ 639.7(b) & (d)(2) (requiring precision with respect to the timing of anticipated layoffs); 20 C.F.R. § 639.10(b) ("[r]olling notice, in the sense of routine, periodic notice, given whether or not a plant closing or mass layoff is impending . . . is not acceptable"). This policy balance is specifically reflected in WARN's "business circumstances" exception, which exempts employers from the general requirement of 60-days' notice before a mass layoff in the case of "business circumstances that were not reasonably foreseeable as of the time the notice would have been required." 29 U.S.C. § 2102(b)(1). As the Court of Appeals noted, however, this exception becomes unworkable—particularly in the context of Government defense contracting—if "reasonably foreseeable" is

read, as Petitioners suggest, to mean merely "possible" or "conceivable." Pet. App. at A27. Rather, what WARN requires is more sensible: that an employer share with affected employees as soon as practicable any special knowledge it has indicating imminent termination of the contract. Here, as the courts below found, General Dynamics provided individual notice to each of thousands of ultimately affected employees, updating them on relevant developments regarding the A-12 contract within days of learning of such developments from the Government. Pet. App. at A5-A9, A20-A21. Moreover, it did so without ever itself believing that the A-12 program would actually be canceled.

Thus, it is not surprising that every court to examine the circumstances of this case has concluded that General Dynamics complied with WARN. Pet. App. at A12-A13, A27-A29; *see also International Ass'n of Machinists*, 821 F. Supp. at 1313 ("cancellation of the A-12 contract . . . was not reasonably foreseeable" 60 days prior to the termination).[2] Moreover, although there may be cases in which nuances of the term "reasonably foreseeable" could be significant, this is not such a case. In construing the exception here, the Court of Appeals simply noted that, if the word "reasonably" is to retain any meaning, it must be to limit the class of "foreseeable" events to exclude those that are merely

---

[2] Similarly, WARN litigation involving General Dynamics' partner on the A-12 program has reached the same conclusion. *See Loehrer*, 98 F.3d at 1062 (recognizing "unique, politically charged area of defense contracts," in concluding that "the Government's cancellation of A-12 contract was not reasonably foreseeable"); *Loehrer v. McDonnell Douglas Corp.*, No. 4-91 CV 01747, slip op. (E.D. Mo. Oct. 14, 1995) ("support for the A-12 was strong enough to find that [the contractors] had exercised reasonable business judgment in continuing to believe that termination would not occur"), *aff'd*, 98 F. 3d 1056 (8th Cir. 1996). Even in litigation between the Government and the contract team, courts have recognized the unexpected nature of the termination decision. *See McDonnell Douglas Corp. v. United States*, 35 Fed. Cl. 358, 371-73 (1996) ("[n]either the Contracting Officer nor the Navy had planned to issue a cure notice; [rather] the timing was dictated by the show cause memorandum from Secretary Cheney").

remote possibilities,[3] thus rendering it "the probability of occurrence that makes a business circumstance 'reasonably foreseeable.' " Pet. App. at A27. Applying this reasonable interpretation to the facts of the A-12 program, the Court of Appeals recognized that the term "reasonably foreseeable" could not, as a practical matter, include the risk of contract cancellation inherent in any Government program:

> Since cancellation is a possibility every time there is a cost overrun, defense contractors like General Dynamics would be put to the needless task of notifying employees of possible contract cancellation and concomitant lay-offs every time there is a cost overrun, and experience teaches us that there are invariably cost overruns, which most often do not lead to contract cancellation.

Pet. App. at A27.

Although Petitioners suggest that WARN's regulations and the decisions of several other courts look to the employer's exercise of "commercially reasonable business judgment" in determining whether an event was "reasonably foreseeable," Brief at 22, they nowhere explain how this test is inconsistent with the Court of Appeals' approach or consistent with the alternative standard they advocate. To the contrary, the requirement that an employer use "commercially reasonable business judgment . . . in predicting the demands of [the] particular market," 20 C.F.R. § 639.9(b)(1)-(2), implicitly recognizes that not every conceivable turn of events should trigger notice under WARN, but rather only

---

[3] This requirement that the event in question be probable, and not merely a possibility, is consistent with application of the "reasonably foreseeable" standard in tort law generally. *See Brady v. Southern Ry. Co.*, 320 U.S. 476, 483 (1943) (in the context of a negligence claim, a "[b]are possibility is not sufficient" to impose a duty to guard against injury); *see also Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 553 n.12 (1994) (noting that where term "reasonably foreseeable" is expanded to encompass all possible results of an event, the qualifying word "reasonably" loses any purpose).

those events that the employer "predicts" (or should have predicted) as likely in its exercise of commercially reasonable business judgment.[4] Accordingly, whether characterized in terms of "probability" (as by the Court of Appeals) or in terms of "predict[ions]" based on "commercially reasonable business judgment" (as in decisions citing the regulations), lower courts have been consistent in recognizing that not every possibility of contract termination gives rise to a notice obligation under WARN.

Finally, Petitioners suggest that the Court of Appeals' approach impermissibly "modifies the plain meaning of the statute" by "shift[ing] the burden of proof to the Petitioners." Brief at 24. Contrary to this assertion, however, the opinion does not address, much less alter, the parties' respective burdens. Rather, it simply affirms that, on the facts of this particular case, "no rational jury could have concluded that contract cancellation was a foreseeable probability until the last minute, *i.e.*, December 14, 1990." Pet. App. at A29. Thus, Petitioners' real dissatisfaction is not with the allocation of burdens, but rather with the lower courts' findings that the evidence is simply insufficient to support a judgment in Petitioners' favor. That fact-bound application of settled law to the evidence of record in this case does not warrant this Court's review. *See General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178 (1938) ("Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it.").

---

[4] *See, e.g., Local Union 7107 v. Clinchfield Coal Co.*, 124 F.3d 639, 641 (4th Cir. 1997) ("a reviewing court must be careful to avoid analysis by hindsight; the trail of harbingers of an unforeseen event always looks brighter in retrospect"), *cert. denied*, 118 S. Ct. 1189 (1998); *Loehrer*, 98 F.3d at 1061 (8th Cir. 1996) (noting, in context of A-12 cancellation, that "[the WARN] Act and its regulations necessarily recognize that even the most conscientious employers are not perfect, and they thus allow needed flexibility for predictions about ultimate consequences that, though objectively reasonable, proved wrong"); *Jurcev v. Central Community Hospital*, 7 F.3d 618, 626 (7th Cir. 1993) (defendant's mere "awareness of these circumstances [leading to cessation of subventions] did not render the . . . decision to stop making subventions reasonably foreseeable"), *cert. denied*, 114 S. Ct. 1830 (1994).

III. This Case Raises No Issue of Broad Application Warranting this Court's Review.

Petitioners assert that WARN has "broad effect . . . concerning the reductions in force occurring on a daily basis in our society." Brief at 30. Even if this generalization were true, however, it would have little significance in this case. The decisions below turn exclusively on a narrow exception to WARN that has resulted in fewer than 20 reported federal decisions at any level in the ten years it has existed and as to which there is no meaningful disagreement among the lower courts. Moreover, this case arises in the still narrower context of Government contracting, and specifically from the unique facts of the A-12 program. Under such narrow circumstances, review could hardly be said to settle "an important question of federal law." Supreme Court Rule 10.

CONCLUSION

For the foregoing reasons, Respondent General Dynamics respectfully requests that the Petition for Writ of Certiorari be denied.

DATED: August 10, 1998

Respectfully submitted,

William J. Kilberg

GIBSON, DUNN &
CRUTCHER LLP
WILLIAM J. KILBERG
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 467-0539

KARL G. NELSON
1717 Main Street, Suite 5400
Dallas, Texas 75201-7390
Telephone: (214) 698-3100
Facsimile: (214) 698-3400
ATTORNEYS FOR RESPONDENT, GENERAL DYNAMICS CORPORATION